IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989
NO. 88-1063

STATE OF TENNESSEE, Petitioner

vs.

JAMES HOWARD TURNER, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, JAMES HOWARD TURNER, respectfully contends that the Petition for Writ of Certiorari filed in this Court by the State of Tennessee should be denied. This case does not depart from established case law. Neither does it offend this Court's decision in Bordenkircher v. Hayes, 434 U.S. 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1968).

The issue raised by the State of Tennessee on the applicability of the presumption of prosecutorial vindictiveness at the state trial court hearing ordered by the District Court at 664 F. Supp. at 1126 must be addressed within the peculiar and special factual circumstances which have guided the federal courts below. The basic predicate fact is that Mr. Turner was denied his constitutional right to counsel at plea bargaining when his original trial counsel advised him to reject a generous two (2) year plea offer to simple kidnapping and go to trial. At trial, he was convicted of murder and two (2) counts of aggravated kidnapping and sentenced to life plus two (2) forty (40) year sentences. These convictions were vacated by the state trial and appellate courts which held that Mr. Turner was denied effective assistance of counsel when he was advised to reject the original offer. This violation required a constitutional remedy on remand.

What distinguishes this case from all the cases cited by the State of Tennessee is that the presumption of prosecutorial vindictiveness is necessary to insure that the previous constitutional violation is remedied. The appropriate remedy to cure the taint of Mr. Turner's loss during plea bargaining requires that Mr. Turner be permitted to present the original two

(2) year plea bargain to the state trial court for approval. A presumption of prosecutorial vindictiveness must apply to the remedial hearing ordered by the federal courts to insure that any decision by the State's prosecutor to rescind the two (2) year plea bargain comports with due process. Otherwise, Mr. Turner would have suffered a constitutional violation without an adequate constitutional remedy. Therefore, when the factual background of this case is presented, the issue raised by the State does not take on the radical implications that the State suggests.

All state and federal courts have unanimously held that Mr. Turner was denied his constitutional right to counsel during the original plea bargaining phase of this case when his original trial counsel, Lance Bailey, incompetently advised him to reject the State prosecutor's two (2) year plea offer to simple kidnapping and to proceed to go to trial on original charges of one (1) count of murder and two (2) counts of aggravated kidnapping. The state trial and appellate courts found that "any competent attorney would have advised the defendant to accept" the original two (2) years offer and Mr. Turner was granted a new trial. 664 F. Supp. at 1117 n. 11.

When the case was remanded and put back on the state trial court's docket, the State's prosecutor was unwilling to re-offer the original two (2) years sentence but would only offer twenty (20) years in exchange for a plea of guilty to aggravated kidnapping. Because the state courts had found that constitutionally incompetent counsel had prevented him from freely accepting the original two (2) year offer before the first trial and because that original offer was never withdrawn by the State prior to trial, Mr. Turner moved the state trial court to

order that the original two (2) year offer be reinstated so that a remedy for the right to counsel violation would be tailored to meet the constitutional injury suffered, citing U.S. v. Morrison, 449 U.S. 361, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981). 664 F. Supp. 1118. (Joint Appendix, pp. 42-43). Mr. Turner also argued in his motion for reinstatement that "[a]ny less drastic remedy other than the relief requested in this motion would violate defendant's state and federal due process rights to be protected from a realistic likelihood of prosecutorial vindictiveness or an apprehension of the same," citing Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), and its progeny.

After an evidentiary hearing, the state trial court granted the motion and ordered the State of Tennessee to reinstate the two (2) year offer or face dismissal of the case. The state trial court found that reinstatement was the only remedy available to neutralize the taint of the right to counsel violation during the original plea bargaining phase of the case. In its February 28, 1985, order of reinstatement, the state trial court further found as a fact as follows: "The State has offered no real explanation as to why the offer is now twenty (20) years instead of two (2) years." 664 F. Supp. at 1115. (Joint Appendix, p. 46).

The state appellate court subsequently reversed the state trial court's order of reinstatement upon finding that the state trial court had no authority to compel the State's prosecutor to make a particular plea offer under any circumstance. 713 S.W.2d at 330. After remand, Mr. Turner filed a petition for writ of habeas corpus in the District Court. Presented with this peculiar factual setting, the District Court granted the petition and this decision was affirmed by the Sixth Circuit Court of Appeals.

The District Court correctly reasoned that the mere grant of a new trial without reinstatement of the original two (2) year plea offer was insufficient to purge the taint of the previous constitutional violation adjudged. 664 F. Supp. at 1123-1124. Therefore, the District Court found that the subseqent offer of twenty (20) years to a plea of guilty to aggravated kidnapping fell far short of making Mr. Turner constitutionally whole. Therefore, the District Court found under these peculiar circumstances that the original two (2) year plea bargain was "presumptively mandated" and that at a remedial hearing to be held before the state trial court, Mr. Turner could present the two (2) year plea bargain to the state trial judge for approval. 664 F. Supp. at 1124. Then Mr. Turner will have been provided a constitutional remedy "tailored to the injury" according to the U.S. v. Morrison mandate. 664 F. Supp. at 1125.

Having ordered the remedial plea hearing, the District Court outlined how the State's prosecutor could rescind the original two (2) year offer without offending the constitutionally mandated remedy of reinstatement. 664 F. Supp at 1124. It is at the remedial state court hearing that the State's prosecutor can choose to rescind the two (2) year agreement by showing through "objective evidence" that rescission is justified and not purely based on vindictive motives. 664 F. Supp. at 1125. Then the District Court wrote: "Now that the petitioner's constitutional infirmity has been cured and he has been provided competent counsel, the State is free to withdraw the offer, so long as that withdrawal is free of a reasonable apprehension of vindictiveness." Id. As the Sixth Circuit properly added, the balancing of interests prescribed by U.S. v. Morrison is accommodated "by allowing the State to withdraw the

two-year plea offer upon showing that such a withdrawal is not the product of prosecutorial vindictiveness" at the remedial hearing. 6th Cir. Slip Opinion, p. A16.

It is precisely this goal of adequately remedying Mr. Turner's constitutional deprivation while not infringing on the discretionary interest of the State of Tennessee which sets this peculiar case apart from the facts presented in Bordenkircher v. Hayes, 434 U.S. 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1968) and U.S. v. Osif, 789 F.2d 1404 (9th Cir. 1988).

The presumption of prosecutorial vindictiveness established in Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), and having its roots in North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), was addressed for the first time by this Court in a pretrial setting in the Bordenkircher v. Hayes case. The Bordenkircher Court held that due process did not prohibit a prosecutor from carrying out a threat, made during initial plea negotiations, to bring additional charges against a defendant who refused to plead guilty to an offense with which he was originally charged. Bordenkircher v. Hayes held that North Carolina v. Pearce and Blackledge v. Perry were distinguishable where the prosecutor's action did not amount to a "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction," the circumstance which North Carolina v. Pearce and Blackledge v. Perry addressed. 434 U.S. at 362, 98 S. Ct. at 667, 54 L. Ed. 2d at 610.

This Court further found that there was no Blackledge v. Perry element of punishment in the "give-and-take" of plea negotiations "so long as the accused is free to accept or

reject the prosecution's offer." 434 U.S. at 363, 98 S. Ct. at 668, 54 L. Ed. 2d at 611. The Court wrote: "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." 434 U.S. at 365, 98 S. Ct. at 669, 54 L. Ed. 2d at 612. (Emphasis added). The Court further distinguished that it was not reviewing a situation "where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360, 98 S. Ct. at 666, 54 L. Ed. 2d at 609.

One basic fact then clearly distinguishes the Turner case from Bordenkircher v. Hayes: because Mr. Turner received constitutionally incompetent advice to reject the original two (2) year plea offer, Mr. Turner was never "free to accept or reject" the State prosecutor's original offer. When the State's prosecutor upped the offer to twenty (20) years after a new trial was granted because of the constitutional violation, the situation that this Court was careful to say was not being addressed in Bordenkircher v. Hayes arose in Mr. Turner's case. That is, the State's prosecutor had increased the sentence offer from two (2) to twenty (20) years and the plea bargain charge from simple to aggravated kidnapping "after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." 434 U.S. at 360, 98 S. Ct. at 666, 54 L. Ed. 2d at 609. Accordingly, the federal courts below did not depart from the teachings of Bordenkircher v. Hayes. See 664 F. Supp. at 1125 n. 33.

Neither did the federal courts render a decision in conflict with the Ninth Circuit Court of Appeals' decision in U.S. v. Osif. U.S. v. Osif required nothing more than a straightforward application of this Court's analysis in Bordenkircher v. Hayes. In U.S. v. Osif, there was no violation of the right to counsel at plea bargaining which required a remedy of reinstatement of the original plea offer at the subsequent trial. There was no obligation from the State's prosecutor to re-offer the original bargain to insure that a constitutional remedy be provided Osif. All that reversal of the original conviction required was a new trial and the refusal of the prosecutor in U.S. v. Osif to re-offer a previously rejected plea offer was not necessary to remedy a constitutional violation as the federal courts have explained in the instant case.

The reason for the invocation of the presumption of prosecutorial vindictiveness in the Turner case is best explained by the "structural analysis" that this Court used in U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. at 2485, 70 L. Ed. 2d 74 (1982). See 664 F. Supp. at 1125 and 6th Cir. Slip Opinion, pp. A15-A16. Both the District Court and the Sixth Circuit Court of Appeals utilized these guidelines in requiring the State of Tennessee to produce "objective evidence" at the remedial state trial court hearing if the State's prosecutor chooses to seek rescission of the "presumptively mandated" two (2) year plea bargain.

The Goodwin Court emphasized that in a post-conviction context where the Blackledge v. Perry concern of "duplicative expenditures of prosecutorial resources" and the North Carolina v. Pearce concern of asking a party "to do over what it thought

it had already done correctly" are present, the Court will "presume" an improper vindictive motive where "action detrimental to the defendant has been taken after the exercise of a legal right." 457 U.S. at 373, 383, 102 S. Ct. at 2489, 2494, 73 L. Ed. 2d at 80, 87. Moreover, if "the institutional bias inherent in the judicial system against the re-trial of issues that have already been decided" is present, "the same institutional pressure . . . might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain a re-trial of decided question." 457 U.S. at 376-377, 383, 102 S. Ct. at 2490-2491, 2494, 73 L. Ed. 2d at 82-83, 87.

Finally, the Court held that the presumption is especially warranted after a defendant has been through a trial and the State has had the opportunity to fully discover and assess all of the information against him, concluding that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision." 457 U.S. at 381-382, 102 S. Ct. at 2493, 73 L. Ed. 2d at 85.

As the District Court and the Sixth Circuit Court of Appeals have pointed out, all the above Goodwin criteria were present at the time Mr. Turner's motion for reinstatement was made, thereby requiring a presumption of prosecutorial vindictiveness to attach and compel the prosecutor to rebut the presumption if rescission of the plea bargain is sought. 664 F. Supp. at 1125. Unlike Bordenkircher v. Hayes, the Goodwin concerns of (1) duplicating "prosecutorial resources," (2) asking a prosecutor "to do over what it thought it had done correctly," and (3) "the institutional bias inherent in the system against

the re-trial of issues that have already been decided" were all present when on remand from the grant of new trial, the State's prosecutor upped Mr. Turner's offer to twenty (20) years from two (2) years. The increase in the sentence offer came after the State had extended Mr. Turner two (2) years originally, after it was rejected on advice of incompetent counsel but never withdrawn by the State pretrial, after a trial had already occurred once, after Mr. Turner's convictions had been subsequently vacated and after the state appellate courts affirmed the original findings of a right to counsel violation at plea bargaining. With these peculiar facts presented to the District Court at this juncture, it correctly held "that the structural analysis of Goodwin requires a finding of a realistic likelihood of vindictiveness in this situation and demands application of a rebuttable presumption of vindictiveness to any plea offer made by the State in excess of its previous offer on the eve of the first trial." 664 F. Supp. at 1125.

This Court should further accord the state trial court's findings of fact the presumption of correctness due under 28 U.S.C. §2254(d) in denying the State's petition. See Wainwright v. Witt, 469 U.S. 412, 425, 105 S. Ct. 844, 853, 88 L. Ed. 2d 841 (1985). The issue of prosecutorial vindictiveness was raised by Mr. Turner in his original motion to reinstate or dismiss of February 14, 1985. 664 F. Supp. at 1118. (Appendix, pp. 42-43). In the state trial court's order of reinstatement, it found as a fact after an evidentiary hearing as follows: "The State has offered no real explanation as to why the offer is now twenty (20) years instead of two (2) years." 664 F. Supp. at 1115. (Joint Appendix, p. 46). Having once failed to make any showing to rebut the charge of prosecutorial vindictiveness in response

to the original motion, the federal courts have properly held that the State of Tennessee cannot rescind the two (2) year plea bargain unless at the remedial state court hearing it can show "objective evidence supporting a non-vindictive increase." 664 F. Supp. at 1126. See also Thigpen v. Roberts, 468 U.S. 27, 32 n. 6, 104 S. Ct. 2916, 2920 n. 6, 82 L. Ed. 2d 23, 30 n. 6 (1984), wherein the presumption of prosecutorial vindictiveness was upheld by this Court: "The State had ample opportunity to rebut it but did not do so."

Mr. Turner further contends that without the presumption of prosecutorial vindictiveness at the remedial state court hearing order below, the State of Tennessee would in effect never be required to honor the constitutionally mandated remedy due Mr. Turner. The opportunity to present the plea bargain for acceptance by the trial court through competent counsel can only occur after the original two (2) year offer is reinstated and only the State of Tennessee can reinstate it. See State ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982). Reinstatement of the original offer "plac[es] the State and the accused in the same positions they would have been in had the impermissible conduct not taken place." Nix v. Williams, 467 U.S. 431, 447, 104 S. Ct. 2501, 2511, 81 L. Ed. 2d 377, 389 (1984); U.S. v. Bowers, 517 F. Supp. 666, 672 (W.D. Pa. 1981).

Requiring the State to overcome a presumption of prosecutorial vindictiveness insures that the State of Tennessee does not take advantage of Mr. Turner who has suffered a serious constitutional loss. Otherwise, the State's prosecutor may without any constitutional accountability be allowed to rescind the offer. Mr. Turner submits that such action by the State's prosecutor would violate the State's "affirmative obligation not

to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." See Maine v. Moulton, -- U.S. --, 106 S. Ct. 477, 485, 88 L. Ed. 2d 481, 493 (1985).

At the very least, the federal courts have remanded this case to a state trial court judge wherein he must first decide whether or not to approve the two (2) year plea agreement. Since the issue raised by the State of Tennessee depends upon the happening of this contingency, this case may not be ripe for this Court to exercise its powers of review at this juncture. Nevertheless, Mr. Turner submits that the decision of the District Court and the affirmance by the Sixth Circuit Court of Appeals is properly supported by precedent and does not offend the legitimate competing interests of the State of Tennessee.

The petition for writ of certiorari should therefore be respectfully denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Kymberly Lynn Anne Hattaway, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219, this 16 day of March, 1989.

J. Russell Heldman